

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

GERALD J. ADAMS,	)	
	)	
Plaintiff,	)	No. 03:12-cv-00829-HU
	)	
vs.	)	
	)	
CAROLYN W. COLVIN <sup>1</sup> ,	)	<b>FINDINGS &amp; RECOMMENDATION</b>
Commissioner of Social Security,	)	
	)	
Defendant.	)	

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<sup>1</sup>Carolyn W. Colvin became acting Commissioner of Social Security on February 24, 2013. Therefore, pursuant to Federal Rule of Civil Procedure 25(d), she is automatically substituted for Michael J. Astrue as Defendant in this case.

HUBEL, United States Magistrate Judge:

The plaintiff Gerald J. Adams seeks judicial review, pursuant to 42 U.S.C. § 405(g), of the Commissioner's final decision denying his application for Supplemental Security Income under Title XVI of the Social Security Act, 42 U.S.C. § 1381 *et seq.* Adams argues the Administrative Law Judge ("ALJ") erred in failing to find him disabled under Listing 12.05C, improperly evaluating the evidence, and finding Adams is functionally able to work. See Dkt. ## 19 & 22. In addition, Adams argues the ALJ erred in failing to adjudicate a prior application for benefits. *Id.*

### ***I. PROCEDURAL BACKGROUND***

Adams protectively filed his application for SSI benefits on March 12, 2008, at age 42, claiming disability since March 31, 2007, due to "[p]aint poisoning, carpal tunnel, worse in left hand, memory loss, learning disability, [and] anger problem." (A.R. 21, 113-18, 129<sup>2</sup>) Adams's application was denied initially and on reconsideration. (A.R. 76-80, 82-84) Adams requested a hearing, and a hearing was held on August 3, 2010, before an ALJ. Adams was represented by an attorney at the hearing. Witnesses at the hearing included Adams, his wife Stephanie Jolee Adams, and a

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<sup>2</sup>The administrative record ("A.R.") was filed electronically using the court's CM/ECF system. Dkt. #13 and attachments. Pages of the A.R. contain at least three separate page numbers: two located at the top of the page, consisting of the CM/ECF number (e.g., Dkt. #13-3, Page 23 of 74) and a Page ID#; and a page number located at the lower right corner of the page, representing the numbering inserted by the Agency. Some pages also contain a page number inserted by the office supplying the records. Citations herein to "A.R." refer to the agency numbering in the lower right corner of each page.

Vocational Expert ("VE"). (A.R. 36-73) On September 3, 2010, the ALJ issued his decision, denying Adams's application for SSI benefits. (A.R. 17-31) Adams appealed the ALJ's decision, and on March 30, 2012, the Appeals Council denied his request for review (A.R. 1-5), making the ALJ's decision the final decision of the Commissioner. See 20 C.F.R. §§ 404.981, 416.1481. Adams filed a timely Complaint in this court seeking judicial review of the Commissioner's final decision denying his application for SSI benefits. Dkt. #1. The matter is fully briefed, and the undersigned submits the following findings and recommended disposition of the case pursuant to 28 U.S.C. § 636(b)(1)(B).

## **II. FACTUAL BACKGROUND**

### **A. Summary of Relevant Medical Evidence**

The record indicates Adams is 5'5" tall. His weight has varied significantly during the period represented in the medical evidence. For example, records indicate he weighed 142 pounds on January 17, 2006 (A.R. 303); 162 pounds on December 31, 2007 (A.R. 326); 173 pounds on October 1, 2008; 161.4 pounds on June 5, 2009 (A.R. 394); 145 pounds on October 27, 2010 (A.R. 417); and 140.2 pounds on July 26, 2011 (A.R. 459).

On December 31, 2007, Adams saw Nurse Practitioner Jason M. Bischoff ("NP Bischoff") at the Chemawa Health Center, for "[e]valuation and Management of Head Aches, [restless leg syndrome], and [medication] refills." (A.R. 326) Adams complained of an "intense urge to move [his] legs" that was worse when he was lying in bed. (*Id.*) He stated his symptoms would resolve when he got up and walked around, but then return when he went back to bed.

1 He also described an "occasional sensation of 'creepy/crawly'"  
2 (*Id.*) Adams also complained of ongoing daily headaches, for which  
3 he was taking Indocin. NP Bischoff increased Adams's Atenolol  
4 dosage for his blood pressure. He prescribed Neurontin for  
5 headaches and restless leg syndrome, and renewed a prescription for  
6 Flexeril (a muscle relaxer). He also noted, "Consider mental  
7 health counseling/meds to aid w/chronic pain." (A.R. 326) In  
8 addition, Adams was given an injection of Toradol. (A.R. 328)<sup>3</sup>

9 On April 28, 2008, Adams saw NP Bischoff for followup of his  
10 headaches, joint pain, and restless leg syndrome, and discussion  
11 about possibly changing his medications. Adams's affect was  
12 "[f]rustrated and angry." (A.R. 323) He stated Indocin and  
13 Flexeril had not helped his pain at all, and the Indocin had caused  
14 stomach pain. Neurontin had helped his restless leg syndrome at  
15 first, but then his symptoms had returned. Notes also indicate  
16 Adams was wearing bilateral wrist braces. In addition, his blood  
17 pressure remained high. NP Bischoff increased Adams's Atenolol  
18 dosage for his blood pressure. He directed Adams to titrate up the  
19 Neurontin to 600 mg. three times daily, as needed to control his  
20 restless leg symptoms. Adams was started on Ultram 50 mg. at  
21 bedtime for pain, and Indocin and Flexeril were discontinued  
22 because they were not helping Adams's symptoms. (A.R. 323-24)

23 On May 2, 2008, Adams saw Nick Dietlein, Psy.D. for an "IQ  
24 evaluation at the request of Oregon Disability Determination  
25

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26 <sup>3</sup>The record also contains a treatment note from August 18,  
27 2006, when Adams was treated for a back strain. (See A.R. 306)  
28 That record, and the treatment note from December 31, 2007, are the  
only medical evidence of record predating Adams's March 12, 2008,  
application for SSI benefits.

1 Services." (A.R. 308) When Dr. Dietlein asked Adams if he under-  
2 stood why he was being evaluated, Adams responded, "I have a lot of  
3 mental problems going on right now. I had a learning disability  
4 many years ago. It is hard to find work when you do not have a  
5 high school diploma or the skills. I have spent most of my life  
6 doing drugs and have been in and out of prison." (*Id.*)

7 Adams stated he finished the sixth grade in school, and had  
8 some schooling during his incarceration. He indicated he "was  
9 identified with learning problems," but he was unable to provide  
10 any detail concerning the nature of those "learning problems."

11 (*Id.*) Adams provided little work history. The doctor noted  
12 Adams's "last job was through a temporary service in Susanville,  
13 California," where Adams "was exposed to heavy paints and . . . had  
14 a law suit going on there." (*Id.*) He stated this "paint exposure"  
15 was "part of [his] illness now." (*Id.*) He also reported problems  
16 with carpal tunnel syndrome in both wrists, and frequent headaches.  
17 He was taking Atenolol for high blood pressure, and some type of  
18 medication for pain. (A.R. 308-09)

19 Adams stated he was not using drugs currently, with his last  
20 use of marijuana occurring "last year," and his last use of alcohol  
21 occurring thirteen years earlier. He used methamphetamine from age  
22 15 to age 19. He is a long-term smoker, smoking about one pack of  
23 cigarettes a day. (A.R. 309; see A.R. 305)

24 Adams reported "significant problems with his sleep because of  
25 problems with pain." (A.R. 309) He usually went to bed around  
26 12:30 to 1:00 a.m., and got up around 8:00 a.m. He had no problems  
27 with his appetite, stating he had gone from 110 pounds the previous  
28 year to 175 pounds at the time of this interview. He indicated the

1 weight gain had caused him to "feel a lot better." (*Id.*) He  
2 described problems with his memory and concentration, noting he  
3 could relate what he had done that day, but he would have diffi-  
4 culty recalling what he did a few days ago. (*Id.*)

5 The doctor noted the following regarding Adams's mental state:

6 While denying any depression Mr. Adams reports  
7 that his depression today is a 6/7 on a scale  
8 of 0-10. He also reports experiencing a 6/7  
9 on an anxiety scale. He states, "I am always  
10 kind of nervous. I don't sit down too much.  
11 I am always on the move." Mr. Adams denies  
12 current or historical thoughts of suicidal or  
13 homicidal ideation. Mr. Adams states, "I try  
14 to stay upbeat. I have thought about the  
15 chemical exposure and that bothers me a lot.  
16 The paint we were using was for military  
17 vehicles and it reportedly had stuff for  
18 biological warfare in it. Doctors have told  
19 me that it will lead to a full body shutdown.

20 Mr. Adams reports that he often worries about  
21 bad things that could happen and has trouble  
22 stopping his worry. He frequently feels  
23 grouchy, cranky, and irritable. He frequently  
24 feels tense and is unable to relax. He  
25 worries about doing things (such as eating or  
26 speaking) in front of other people. He often  
27 prefers to be alone rather than with family or  
28 friends. He reportedly often does not feel  
like doing anything and feels bad about things  
that he has done in the past. Mr. Adams  
reports he often has trouble following verbal  
instructions, has trouble getting organized,  
avoids doing things that require concentration  
and is easily distracted by events going on  
around him. He describes himself as forget-  
ful, fidgety, has trouble sitting still, and  
is always on the go. Mr. Adams reports that  
he often loses his temper, is argumentative,  
and is easily annoyed by other people. He  
reportedly has sudden mood swings where he  
becomes very depressed or irritable.

25 (*Id.*)

26 Adams described his daily activities, stating he gets up at  
27 8:00 a.m., makes coffee, smokes a cigarette, and then watches  
28 television "all day long." (*Id.*) He does not eat breakfast, eats

1 lunch sometime in the afternoon, and only eats dinner "every other  
2 day." (*Id.*) If his wrists are not hurting too much, he might  
3 vacuum or mow the yard. He showers every other day. He used to  
4 enjoy bowling and riding a bike, but now he has no hobbies or  
5 activities. "His three favorite activities are watching TV, being  
6 with his wife and smoking his cigarettes." (A.R. 310) Adams  
7 stated he "can sit for 15-30 minutes, stand for half an hour, and  
8 walk 2-3 miles without tiring." (A.R. 309) He receives \$155 a  
9 month in food stamps, and has no other income. He does not do any  
10 grocery shopping. He can use a telephone, but has problems using  
11 a phonebook. (A.R. 309-10)

12       Regarding Adams's mental status exam, the doctor noted Adams  
13 "appeared to be anxious throughout [the] interview." (A.R. 310)  
14 Adams offered little spontaneous information about himself, and did  
15 not talk much, although he was "generally friendly and appeared to  
16 be a willing participant in the interview." (*Id.*) Adams was  
17 "unable to name the current Governor of Oregon and was unable to  
18 name the last three presidents of the United States." (*Id.*) He  
19 had mostly indirect eye contact; no apparent disturbance of motor  
20 function or agitation; and walked with a normal gait and posture.

21       Dr Dietlein administered the Wechsler Adult Intelligence  
22 Scale-Third Edition (WAIS-III), "to obtain a snapshot of [Adams's]  
23 general cognitive abilities." (*Id.*) He noted Adams "appeared to  
24 put a good effort forth" on the test. (*Id.*) The test yielded a  
25 Verbal IQ of 64, Performance IQ of 69, and Full Scale IQ of 63, all  
26 three of which were deemed "Extremely Low." (*Id.*) "His overall  
27 thinking and reasoning abilities exceed those of approximately 1%  
28 of adults his age." (*Id.*) The test results further indicated

1 Adams has "significant problems" with his "ability to attend to  
2 verbally presented information, to process information in memory  
3 and then to formulate a response." (A.R. 311) He "had significant  
4 problems performing basic mental arithmetic," and he exhibited an  
5 "inadequate" ability to think abstractly. (*Id.*)

6 Dr. Dietlein noted the following conclusions (among others):

7 With Mr. Adams'[s] current poor cognitive  
8 functioning in mind, it is unclear whether  
9 Mr. Adams is suffering from a learning disa-  
10 bility. Based on today's assessment findings,  
11 it is plausible that Mr. Adams may have had  
12 ADHD as a child with tandem learning disabili-  
ties. His cognitive limitations in tandem  
with his reported chemical exposure may have  
compromised what may have been previous poor  
cognitive functioning.

13 Today's evaluation revealed that Mr. Adams had  
14 difficulty understanding and remembering in-  
structions. He had problems sustaining his  
15 concentration and attention and will likely  
16 find tasks that require these abilities very  
difficult. Mr. Adams gave evidence of being  
able to persist in what was asked of him. He  
was also clearly able to engage in social  
interactions successfully. I believe  
17 Mr. Adams would be able to manage any funds  
18 that might be given to him.

19 (A.R. 313)

20 On May 20, 2008, Adams saw NP Bischoff to get started on  
21 Prozac. Adams reported "[f]eeling angry and down all the time due  
22 to persistent [headache] pain." (A.R. 321) Adams's wife stated  
23 Adams had frequent "angry outbursts [and] restless sleep." (*Id.*)  
24 NP Bischoff noted Adams's affect was "sullen." (*Id.*) Because  
25 Adams's headaches were now "constant," and his various joint pains  
26 had increased in intensity, NP Bischoff advised Adams that he  
27 should see a neurologist, and Adams and his wife "need[ed] to find  
28 a way to afford doing that since [Adams's] quality of living has



1 steadily decreased over the past year." (*Id.*) Adams declined a  
2 referral to a neurologist at this time. (*Id.*)

3 Adams saw NP Bischoff on June 2, 2008, for followup of his  
4 Prozac trial, and to discuss his ongoing headaches. Adams stated  
5 he thought he was feeling some positive results from the Prozac,  
6 but his wife was "doubtful at this time." (A.R. 381) Adams  
7 continued to have headaches at 6-10/10 in intensity, now disrupting  
8 his sleep at times, but no new neurological changes. He was  
9 frustrated with his "constant pain." His Neurontin was increased  
10 from 1500 mg. to 1800 mg. daily to address continued restless leg  
11 problems. Percocet was prescribed for his chronic pain symptoms,  
12 but Adams was "[w]arned" that the dosage would not be increased in  
13 the near future. (*Id.*)

14 On July 3, 2008, Adams saw NP Bischoff for followup of his  
15 "chronic medical conditions." (A.R. 379) Adams's pain was fluc-  
16 tuating, but was relatively stable on Percocet. His restless leg  
17 syndrome was stable on Neurontin, and he had no new neurological  
18 symptoms or problems. His medications were continued without  
19 change. (*Id.*)

20 On July 9, 2008, a disability investigator authored a Report  
21 of Investigation regarding an investigation into Adams's disability  
22 claim. (A.R. 333-40) The report indicates an investigation was  
23 requested on May 15, 2008, because Adams was "suspected of feigning  
24 his disability for secondary gain." (A.R. 335) Notes indicate  
25 Adams had "a history of carpal tunnel for several years, right  
26 greater than left. He is right-handed and does manual labor,  
27 working in a junk yard." (A.R. 336) His carpal tunnel diagnosis  
28 had been confirmed by positive Phalen's and Tinel's signs. (*Id.*)

1 The investigator went to Adams's residence on June 26, 2008, to  
2 interview Adams. (It appears Adams did not know the investigator  
3 was coming. See A.R. 337) When he encountered Adams, Adams was  
4 wearing braces on both wrists. The investigator noted that Adams's  
5 girlfriend attempted to answer each question put to Adams, but the  
6 investigator ignored her and attempted to elicit responses from  
7 Adams.<sup>4</sup> The investigator noted the following observations of  
8 Adams:

9 ADAMS actually presented as sober, alert,  
10 fully oriented to person(s), place, topics  
11 discussed, and had good memory recall. He was  
12 talkative, personable, socially appropriate,  
13 and even stopped conversation to correct a  
14 small child on two different occasions. His  
15 speech, although not always grammatically  
16 correct, was fluent, linear, and he demon-  
17 strated a good vocabulary. He gave the  
18 impression of someone that was perhaps unedu-  
19 cated but not retarded or lacking in cognitive  
20 functioning.

21 \* \* \*

22 Cognitively speaking, ADAMS presented as  
23 functional. He is perhaps uneducated but cer-  
24 tainly able to make his needs known to others  
25 and had goal directed thoughts and speech. He  
26 had no trouble tracking the conversation with  
27 the investigator and was able to forecast  
28 probable results when discussing criminal  
behavior on the part of others. He was quick  
to point out to the investigator that he had  
been clean and sober for over a year, had not  
been in trouble with law enforcement, and had  
not been driving because he was aware his  
license was suspended. He had good recall,  
both short and long-term, demonstrated by his  
recall of DMV visits, prior incarcerations,

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26 <sup>4</sup>The record sometimes refers to Adams's "girlfriend," and  
27 sometimes to his "wife." Both appear to be the same person -  
28 Stephanie Adams. Adams and his wife were married from 1986 to  
sometime in 1991, when they divorced. They got back together and  
remarried sometime in 2007. (See A.R. 56-57)

1 his Siletz Indian heritage and benefits, and  
2 recent shopping trips to Salem Center mall.

3 Physically, ADAMS was able to stand and talk  
4 to the investigator for roughly forty minutes,  
5 walk without aid or assistive devices, crouch  
6 to his knees, bend at the hips, and use his  
7 neck, shoulders, arms, and hands in a normal  
8 fashion. As mentioned before, he was wearing  
9 two wrist braces and claimed he was scheduled  
10 for carpal tunnel surgery. He also informed  
11 the investigator that he was "terminal" and  
12 expected to die fairly soon. He stated that  
13 he'd been exposed to toxic paint fumes in  
14 California several years ago, and the doctors  
15 had told him he'd probably be dead in ten  
16 years. Although he never tried to explain his  
17 wrist injury, he proclaimed that he was unable  
18 to work and had applied to SSA for disability.  
19 A short time later, when talking about his  
20 internet usage, he revealed that he had  
21 recently applied for several local jobs via  
22 the internet, including a nearby Oil Can  
23 Henry's and a car lot.

24 At the conclusion of the interview, the inves-  
25 tigator asked ADAMS to view several plastic  
26 sleeves of photographs in an effort to iden-  
27 tify someone. He was handed five separate  
28 sheets of plastic, and had no trouble grasp-  
ing, shuffling, or manipulating them to view  
each sheet separately. Following another  
strong-gripped handshake at the end of the  
interview, the investigator departed.

19 (A.R. 338-39)

20 During the interview, Adams produced an envelope of papers he  
21 had received from the Social Security office. One paper listed his  
22 employment history. Adams had written "Not Mine" next to a couple  
23 of entries, which he showed to the investigator, stating he had  
24 never worked for those companies. The investigator noted Adams had  
25 gone through the list, "turn[ing] the pages and . . . reading the  
26 addresses aloud. . . . He was able to read the company names and  
27 addresses without difficulty. He also had no problems holding the  
28

1 papers in his hands and manipulating the pages as he turned them."

2 (A.R. 338)

3 On July 23, 2008, Physical Medicine and Rehabilitation spe-  
4 cialist Linda L. Jensen, M.D. reviewed the record and completed a  
5 "Physical Summary" regarding Adams. She noted Adams claimed he  
6 could not grip a cup, but "spends his day watching TV, drinking  
7 coffee and his grip was intact as observed by investigators."

8 (A.R. 341) She noted Adams's appearance at the consultative  
9 evaluation by Dr. Dietlein "was significantly different from that

10 observed by investigators where [Adams was] more interactive and  
11 able to read." (*Id.*) In addition, although Adams claimed daily

12 headaches, he had declined his doctor's offer of a referral to a  
13 specialist, and he "did not report problem with headaches at [the  
14 consultative evaluation] or with investigators." (*Id.*) Dr. Jensen

15 also noted Adams's report that he had applied for several jobs was  
16 inconsistent with his claim that he is disabled and only able to  
17 perform minimal daily activities. For these reasons, she found  
18 Adams's statements about his functional abilities "not credible."

19 (*Id.*)

20 On July 30, 2008, psychologist Dorothy Anderson Ph.D. reviewed  
21 the record, and completed a Psychiatric Review Technique form (A.R.

22 347-60), and a Mental Residual Functional Capacity Assessment form  
23 (A.R. 361-63) regarding Adams. She found that Adams has an

24 unspecified cognitive disorder, and a dysthymic disorder, causing  
25 moderate difficulties in Adams's ability to maintain concentration,  
26 persistence, or pace; mild restriction in his activities of daily  
27 living; no difficulties in maintaining social functioning; and no  
28 episodes of extended decompensation. (A.R. 347-57) Dr. Anderson

1 found that Adams's "cognitive [disorder] NOS and dysthymia . . .  
2 limit[] his ability to complete detailed or complex tasks," but  
3 Adams is "[n]ot limited in his ability to complete simple, routine  
4 tasks." (A.R. 359)

5       Regarding Adams's specific functional limitations, Dr. Ander-  
6 son indicated Adams would be moderately limited in the ability to  
7 understand, remember, and carry out detail instructions; interact  
8 appropriately with the general public; and set realistic goals or  
9 make plans independently of others; but he would not be  
10 significantly limited in any other work-related mental functional  
11 ability. (A.R. 361-63)

12       On October 1, 2008, Adams saw NP Bischoff for followup of his  
13 carpal tunnel syndrome, and complaints of "chronic low back pain  
14 and chronic headaches." (A.R. 374) Adams complained of photo-  
15 phobia with the headaches. He stated if he could sleep, the  
16 headaches often were relieved. He reported trying to cut down on  
17 smoking and reduce his caffeine intake. Adams hoped to get his  
18 carpal tunnel problem treated once he was approved for the Oregon  
19 Health Plan. He was using splints on both wrists "all day and  
20 night with limited benefit." (*Id.*) His blood pressure also  
21 remained high despite medication. His medications were continued;  
22 notes indicate he was taking Atenolol, Prozac, Neurontin, and  
23 Oxycodone daily. (A.R. 374-76) Hydrochlorothiazide was added to  
24 his medication regimen for blood pressure control. (A.R. 376)

25       On December 5, 2008, Adams saw family practitioner Roger H.  
26 Applegate, M.D. at the Chemawa Health Center with a complaint of  
27 worsening headaches. Notes indicate Adams had a "[l]ong, compli-  
28 cated [history] of headaches; now occurring daily, mostly in back

1 of head w/radiation to forehead ('mohawk' distribution). Usually  
2 start in early afternoon and continue on until bedtime[;] sometimes  
3 start first thing in a.m. Pain described as sometimes steady,  
4 sometimes throbbing, intensity 8-10." (A.R. 372) Adams had tried  
5 Excedrin, Flexeril, Tramadol, and Tylenol #3, all without relief.  
6 He currently was prescribed one Percocet daily, and stated this  
7 worked at first, but now he had to take two pills at a time to get  
8 relief from the pain. He had "taken 30 tabs in 11 days."  
9 (*Id.*) Adams also complained of ongoing carpal tunnel syndrome  
10 which had "plagued him" for years. He had been awaiting approval  
11 for surgery, and notes indicate Adams had "just now became eligible  
12 for [the Oregon Health Plan]." (*Id.*) The doctor explained to  
13 Adams that his headaches had an "analgesic rebound" component, and  
14 Adams might eventually have to withdraw from all pain medications.  
15 He gave Adams an "early" refill of his Percocet, but indicated he  
16 would not authorize further refills. He also started Adams on  
17 amitriptyline. Adams was referred to orthopedics for his carpal  
18 tunnel syndrome. (*Id.*)

19 Sometime in December 2008, NP Bischoff wrote the following  
20 statement regarding Adams's condition and treatment<sup>5</sup>:

21 Mr. Gerald Adams is under the care of the  
22 Chemawa Indian Health Service Clinic. He cur-  
23 rently suffers from multiple neurological pain  
24 processes that prevent him from prolonged  
25 physical activity. A Clinical Psychologist  
26 has also evaluated him with findings support-  
ing Mr. Adams['s] inability to hold gainful  
employment at this time. Finally Mr. Adams is  
on several medications that can impair func-

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27 <sup>5</sup>The statement itself is undated, but the medical records  
28 transmitted with the statement encompass treatment notes from  
June 2, 2008, through December 5, 2008. (See A.R. 371-83)

1           tioning in a work setting. The progression of  
2           his medical conditions is unclear and not  
3           expected to improve within the foreseeable  
4           future.

5           (A.R. 371)

6           On December 15, 2008, psychologist Kordell N. Kennemer, Psy.D.  
7           reviewed the record and completed a "Mental Summary" in connection  
8           with Adams's request for reconsideration of his disability  
9           application. Dr. Kennemer concurred with Dr. Anderson's July 2008  
10          findings. (A.R. 383)

11          On December 16, 2008, family practitioner Richard Alley, M.D.  
12          reviewed the record and prepared a "Physical Summary," concurring  
13          with Dr. Jensen's previous opinion. Dr. Alley gave NP Bischoff's  
14          opinion letter no weight because it was undated, and was  
15          inconsistent with the medical evidence of record. (A.R. 384)

16          Adams saw NP Bischoff on January 14, 2009, for followup of his  
17          headaches and carpal tunnel symptoms. Adams reported no  
18          significant changes in his headache pattern or pain. He had  
19          reduced his caffeine intake to two cups of coffee per day, cut down  
20          on his smoking, and was watching his diet. Nevertheless, he  
21          continued to have daily headaches that sometimes disrupted his  
22          sleep. He was taking two Percocet at bedtime with limited results.  
23          He stated his carpal tunnel symptoms were better when he used  
24          braces on his wrists, but otherwise his wrists were painful with  
25          even moderate use. Adams now was on the Oregon Health Plan, so he  
26          was referred to a neurologist for his headaches. He was switched to  
27          a long-acting oxycontin medication for pain, and was directed to  
28          leave a message at the clinic in two weeks regarding its  
            effectiveness. His blood pressure was up, and Lisinopril was added

1 to his medications for better blood pressure control. (A.R. 396-  
2 97)

3 On April 13, 2009, Adams saw rehabilitation specialist John  
4 French, M.D. for a nerve conduction study in connection with  
5 Adams's complaints of carpal tunnel pain. The nerve conduction  
6 study was normal bilaterally, and he had a normal EMG of his right  
7 upper extremity and right cervical paraspinals. (A.R. 411-12) The  
8 doctor found "no evidence of a peripheral entrapment neuropathy,  
9 polyneuropathy, plexopathy, no right arm evidence of an acute or  
10 chronic radiculopathy." (A.R. 412)

11 On June 5, 2009, Adams saw NP Bischoff for routine followup of  
12 his chronic pain issues. Adams reported doing well overall, noting  
13 his pain had improved somewhat since his last visit. He no longer  
14 needed to wear the braces on his wrists; his headaches were less  
15 intense; and he was "having periods almost pain free." (A.R. 394)  
16 Adams stated he had been without pain medications for two weeks and  
17 had experienced some withdrawal symptoms, but no pain spikes. He  
18 was "[e]ncouraged by . . . negative head CT and peripheral nerve  
19 conduction studies last winter." (*Id.*) Adams's urine drug screen  
20 was positive for marijuana, and he was told that he would have to  
21 have drug screens prior to each followup visit for a few months.  
22 If he had another positive screen, then he would "be withdrawn from  
23 opiod [sic] use at this clinic." (A.R. 395) Adams stated it "was  
24 just an experiment to try and [treat] the pain," and he was "not  
25 worried about [the] next UA." (A.R. 395) His medications were  
26 continued without change. (*Id.*)

27 Adams saw NP Bischoff for followup on August 27, 2009. Adams  
28 stated oxycontin had been ineffective in controlling his pain, and



1 he had "been out for several weeks now anyway." (A.R. 392) His  
2 urine drug screen remained positive for marijuana, and Adams  
3 stated he preferred to use the marijuana for pain rather than  
4 medication. Adams's wife voiced a concern that Adams's  
5 anger/volatility had increased, and NP Bischoff increased Adams's  
6 Prozac dosage from 40 mg. to 60 mg. daily. Adams was continued on  
7 2700 mg. daily of Neurontin for restless leg syndrome, as well as  
8 amitriptyline 10 mg. at bedtime, and his blood pressure medications  
9 and antacids. (A.R. 392-93)

10 The record evidence indicates that more than six months passed  
11 before Adams sought further medical treatment. On March 12, 2010,  
12 Adams saw Nurse Practitioner Ruth A. Thomas ("NP Thomas") at the  
13 Liberty Street Clinic to establish care. Adams again reported that  
14 he had been "exposed to toxic paint" in about 2000, and he had been  
15 told he only had ten years to live before he would go "into total  
16 organ failure." (A.R. 401) Adams stated he had been "sent to  
17 paint vehicles for the military without protective gear. Later [he  
18 was] told the paint was a biochemical weapon." (*Id.*) Adams stated  
19 his worst problems currently were "[d]ebilitating headaches, toxic  
20 neuropathy, and severe pain." (*Id.*) He stated his pain from the  
21 "toxins" was nearly constant and severe. (*Id.*) He reported  
22 drinking "2 pots of coffee daily and smok[ing] up to 1 pack of  
23 cigarettes." (*Id.*) Adams also complained of chronic depression  
24 with symptoms of "anhedonia, fragmented sleep, feeling not good  
25 enough and sadness." (*Id.*) NP Thomas reduced Adams's Prozac  
26 dosage and started him on Cymbalta 30 mg. daily. She increased his  
27 Neurontin to 3600 mg. daily for chronic "Neuropathy, toxic," and  
28 added Mirapex 1 mg. three times daily, and Elavil 50 mg. at bed-

1 time. She continued his blood pressure medications without change,  
2 and prescribed Percocet 7.5/500 mg., one tablet every six to eight  
3 hours as needed for pain. (A.R. 403)

4 Adams saw NP Thomas for followup on April 22, 2010. Adams  
5 indicated he was "[h]appy with his current treatment plan but [was]  
6 experiencing an exacerbation of his old chronic back pain." (A.R.  
7 405) His other chronic pain issues continued, as well. Notes  
8 indicate Adams was "keeping appointments, exercising regularly and  
9 taking medications regularly." (*Id.*) His medications were  
10 refilled, with new prescriptions for Ibuprofen 800 mg. every eight  
11 hours, Robaxin (a muscle relaxer) 150 mg. twice daily, and Prilosec  
12 for GERD. (A.R. 406-07)

13 Adams saw NP Thomas on October 27, 2010, for followup of hip  
14 pain, and a complaint of a possible broken toe. Adams stated he  
15 had attended a friend's funeral in Nevada, and his hip joint pain  
16 "was better there," but his symptoms had returned after returning,  
17 and he had been "lying in bed with his left hip 'frozen up.'" (A.R. 416)  
18 He had been "[u]nable to move accompanied by exquisite  
19 pain." (*Id.*) Although his symptoms had improved somewhat by the  
20 time of this examination, he stated "the stiffening of the joi[n]t  
21 can happen any time and does so sud[d]enly." (*Id.*) An x-ray of  
22 his hip was ordered. In addition, Adams stated he had "[d]ropped  
23 an outboard boat motor on his left foot crushing his great toe." (*Id.*)  
24 The toe had been very swollen, but there was no discolora-  
25 tion, and his range of motion was improving. No treatment was  
26 ordered for his toe. (*Id.*) The record indicates the x-ray exam of  
27 Adams's left hip was "completed" (see A.R. 418), but no report  
28 appears in the record.

1 On April 6, 2011, Adams saw NP Thomas for followup. Adams  
2 stated "his chronic back pain [was] fairly well controlled." (A.R.  
3 419) He was managing most of his activities of daily living  
4 "without difficulty," and was not experiencing any side effects  
5 from his medications. (*Id.*) He had begun having pain in his right  
6 elbow, centered over the right lateral epicondyle. The pain  
7 increased with movement, and improved somewhat with stabilization.  
8 NP Thomas recommended a "small velcro band to be placed on [the]  
9 arm about 2 inches distal to the elbow." (*Id.*) Adams stated he  
10 had tried to see a mental health doctor or counselor at West Salem  
11 Clinic, but was "told there were no openings." (*Id.*) According to  
12 Adams, he had been told he might be able to get in to see someone  
13 if he had a referral from his primary care physician. NP Thomas  
14 noted Adams was positive for anhedonia, anxiety, feelings of  
15 hopelessness, mood swings, poor insight, pressured speech, and  
16 anger issues. (A.R. 420) She initiated a referral for Adams to  
17 the mental health clinic. (A.R. 419)

18 On June 1, 2011, Adams saw NP Thomas for followup. Adams was  
19 "hoping for some kind of surgical repair for his back pain." (A.R.  
20 422) A bone scan of his right low back was ordered. (*Id.*) The  
21 bone scan was done on June 2, 2011, and showed "scoliosis of the  
22 mid lumbar spine to the left as well as focally increased uptake of  
23 radiopharmaceutical over the mid lumbar spine on the concave right  
24 side," specifically "over the facet joints bilaterally at the L5-S1  
25 level, left greater than right, and over the expected L3-4 facet  
26 joint on the right." (A.R. 439)

27 On July 6, 2011, Adams saw psychiatrist Joel Suckow, M.D. at  
28 Northwest Human Services, West Salem Mental Health, for a psy-

1 chiatric consultation, "diagnostic clarification and medication  
2 recommendations." (A.R. 447; see A.R. 447-53) Adams's wife  
3 accompanied him, and was present throughout the evaluation. (*Id.*)  
4 Dr. Suckow found Adams's behavior to be unremarkable, and his  
5 affect to be "appropriate and full and congruent w/stream of  
6 thought." (A.R. 450) No psychomotor behaviors were present, and  
7 Adams sat "relaxed throughout" the interview. (*Id.*) His mood was  
8 "labile, anxious, irritable and depressed." (A.R. 451) He had  
9 fair judgment and poor insight. The doctor noted, "Most evident is  
10 interpersonal dynamics between [Adams] and his wife, which obvi-  
11 ously will not be treatable w/a psych med per se." (*Id.*) He found  
12 Adams's symptoms to be most consistent with a generalized anxiety  
13 disorder and dysthymia, based on Adams's reported history. (*Id.*)  
14 He started Adams on a trial of a "low/moderate dose of Risperdal,"  
15 to target Adams's symptoms of "irritability, paranoia, and beha-  
16 vioral (primarily verbal) outbursts, as well as mood lability."  
17 (*Id.*) The doctor expressed doubt that Adams would achieve 100%  
18 remission of his core symptoms. He referred Adams for further  
19 mental health services. (*Id.*)

20 Adams saw NP Thomas on July 18, 2011, for followup of a "right  
21 wrist" fracture. Adams stated he had fallen while riding his  
22 wife's bicycle on July 13 or 14, landing on his "left outstretched  
23 wrist. Diagnosed with fracture of the left arm at ER."<sup>6</sup> (A.R.  
24

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25  
26 <sup>6</sup>There is no explanation for the discrepancies in this treat-  
27 ment note, which initially refers to a "right wrist" fracture, but  
28 then refers to a "fracture of the left arm" and a "Left hand . . .  
forearm/wrist" fracture. (A.R. 426, 427). All other treatment  
notes, x-rays, and the like, refer to a fracture of the right  
wrist.

1 426) Adams's wrist was in a "splint with soft wrapping and arm  
2 sling." (*Id.*) Adams had not been icing as directed, but stated he  
3 would begin that day, and continue keeping his wrist elevated. He  
4 was referred to an orthopedist. (*Id.*)

5 Adams saw Orthopedic Physician's Assistant Melissa R. Coombs  
6 ("PA Coombs") at Hope Orthopedics of Oregon on July 26, 2011.  
7 Notes indicate Adams had fallen off a bike on July 13, 2011,  
8 "resulting in a right distal radial fracture. He was seen at the  
9 ER and placed into a splint. He states that he has some pain but  
10 the pain medicine that the ER gave him is working well. Pain scale  
11 3/10." (A.R. 458) Adams's right wrist exhibited mild to moderate  
12 swelling. He had "maximum tenderness" of his right wrist, with his  
13 wrist range of motion limited by pain. X-rays were reviewed, and  
14 the decision was made to treat the fracture "in a closed fashion,"  
15 with a soft cast. He was directed to elevate his wrist and use ice  
16 as needed, and to return in four weeks for removal of the cast.  
17 (A.R. 458-59) Notes from another provider indicate Adams never  
18 returned for removal of his cast, removing the cast early himself.  
19 (See A.R. 433)

20 On December 23, 2011, Adams saw Nurse Practitioner Michelle  
21 Lane ("NP Lane") at the Liberty Street Clinic for followup of his  
22 high blood pressure, and chronic low back pain "due to spondylosis  
23 and [degenerative disc disease]." (A.R. 430) He also complained  
24 of a headache. (A.R. 431) Adams stated his back pain was under  
25 control on his prescription for oxycodone 15 mg., four tablets per  
26 day as needed. (A.R. 430) His medications were refilled. (A.R.  
27 432)

1 Adams saw NP Lane on February 6, 2012, for a complaint of  
2 right wrist pain. Notes indicate Adams had fractured his wrist the  
3 previous summer, but he had removed his cast early, and had not  
4 gone back to the orthopedic specialist for followup. His wrist was  
5 "aching, more painful recently." (A.R. 433) Adams reported  
6 "shoveling manure and caus[ing] increased pain." (*Id.*) In addi-  
7 tion, Adams reported running out of all of his medications "due to  
8 flooding last month - was living at river, water carried away his  
9 [prescriptions]." (*Id.*) He had been taking his girlfriend's blood  
10 pressure medication intermittently. (*Id.*) Adams's medications  
11 were refilled, and an x-ray was ordered of his right wrist. (A.R.  
12 435-36) The x-ray, taken the same day, showed a "healing intra-  
13 articular fracture of the distal radius"; normal carpal alignment;  
14 and some "[m]ild degenerative changes of the distal radioulnar  
15 joint" that were noted to be "stable." (A.R. 441)

16 Adams returned to see NP Lane on February 8, 2012, complaining  
17 of increased pain and decreased range of motion in his right wrist.  
18 He was referred to Orthopedics for further evaluation. (A.R. 437-  
19 38)

## 21 **B. Adams's Testimony**

### 22 **1. Hearing testimony**

23 At the time of the ALJ hearing, Adams was living with his wife  
24 and a 22-year-old daughter in Salem, Oregon. (A.R. 42) He was  
25 born in 1966, making him 44 years old at the time of the hearing.  
26 He is 5'5" tall, and at that time weighed 150 pounds. (A.R. 43)

27 Adams was unsure what grade he finished in school, stating  
28 "maybe the fifth grade." (*Id.*) He does not have a GED. He got

1 "some vocational training stuff" when he was a teenager, but has no  
2 other training or education. (*Id.*) He stated he "can read a  
3 little but not a lot." (A.R. 44) He is able to read his name and  
4 some of his children's names, but not a newspaper. He cannot write  
5 because he "really can't spell at all." (*Id.*)

6 Adams stated he last had a wage-paying job in about 2000, when  
7 he worked "for a labor ready service out of Reno, Nevada." (A.R.  
8 45) His only current income is food stamps. (*Id.*) He stated he  
9 is unable to work because of problems with his hands, and "severe  
10 headaches." (*Id.*) He has "no feeling" in his hands, causing  
11 "trouble hanging onto anything," and frequent dropping of objects.  
12 (A.R. 46) He is unable to lift anything over twenty pounds without  
13 dropping it. He can hold a coffee cup "for awhile," but drops it  
14 at least once a day on most days because of the lack of feeling in  
15 his hands. (A.R. 46-47, 51) When he tries to lie down for a nap,  
16 and for awhile after he gets up, his hands "will be real tingly and  
17 numb." (A.R. 51) He wore braces on his wrists that "worked for  
18 awhile," but after awhile, they stopped helping. (*Id.*) Adams  
19 stated he also has problems understanding and remembering instruc-  
20 tions. (A.R. 46)

21 Adams acknowledged that he used alcohol and methamphetamine  
22 extensively in the past, but stated he no longer uses them. He  
23 stopped drinking in about 2000, when he was diagnosed with "some  
24 kind of lead poisoning." (A.R. 47) At the time of the ALJ  
25 hearing, he had been clean and sober for three years. He went  
26 through a six-month outpatient substance abuse treatment program  
27 through his Indian tribe. (A.R. 47-48)

1 Adams stated he has "a terminal condition" resulting from  
2 "some kind of paint poisoning that [he] received while working for  
3 C-R Army Depot." (A.R. 48) According to Adams, he, and others who  
4 did the same work, had blood tests so doctors could determine the  
5 amount of toxic material in their blood. He stated he and two  
6 others had "the most poisoning, and two of them have already  
7 passed." (A.R. 48-49) He filed a worker's compensation claim, but  
8 stated his "lawyer did something," and he only ended up getting  
9 \$600, while "everybody else got 44,000." (A.R. 49) Adams could  
10 not remember the doctor's name who told him that his condition is  
11 terminal. He stated he attempted to get his records from Reno,  
12 Nevada, but was told "the vault's closed or . . . there's some  
13 reason they can't send [the] papers." (A.R. 49-50)

14 Adams indicated he had been trying marijuana for his headaches  
15 "because the pills only go so far." (A.R. 50) He stated marijuana  
16 helps him sleep. (*Id.*) He had a medical marijuana card at some  
17 time in the past, and stated he had applied to get one again.<sup>7</sup>  
18 (A.R. 54-55) He stated his headaches are worst at the end of the  
19 day, when he has "like a blinding, piercing pain to where [he]  
20 wants to . . . lay down and pray for it to go away." (A.R. 50) He  
21 has severe headaches "at least five days out of the week." (*Id.*)  
22 He also has headaches the other two days, but they are not as  
23 severe. (*Id.*)

24 Adams stated he takes "three blood pressure pills, a pain  
25 pill," and amitriptyline. (*Id.*) His oxycodone dosage varies  
26 depending on the severity of his headache. He usually takes three

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27  
28 <sup>7</sup>Medical records indicate that by July 6, 2011, at least,  
Adams had a "medical card" for marijuana. (A.R. 451)



1 or four pills a day, but if the headache is particularly severe, he  
2 may take six or seven pills. The pills make him very sleepy.  
3 (A.R. 52) He takes Cymbalta for his "anger issues." (*Id.*) He  
4 stated he gets "really grumpy," and screams and yells at his wife.  
5 (*Id.*) He indicated if he had to "stand on a cannery bar all day,"  
6 he would "be really upset" by the end of the day, "just from  
7 standing there." (A.R. 53) He does not go out into the community  
8 alone. He may go to the park with his brother, or to the store or  
9 a doctor's appointment with his wife, but he does not like being  
10 around people. He feels his headaches are not as bad if he just  
11 stays home, doing nothing. (*Id.*)

12 He and his wife sometimes go to church, if they have the gas  
13 money. Their daughter lives with them and does most of the house  
14 cleaning, and about half of the cooking, with Adams's wife doing  
15 the other half of the cooking. Their daughter's boyfriend mows the  
16 lawn. Adams stated he sometimes will sweep the floor when he feels  
17 able, and he takes out the garbage, but he is unable to mow the  
18 lawn. (A.R. 53-54) He can put a TV dinner in the microwave, but  
19 he has trouble reading instructions on boxes. (A.R. 54)

## 21 **2. Written testimony**

22 On April 17, 2008, Adams completed a Pain Questionnaire  
23 (apparently with his wife's assistance; see A.R. 57-58).  
24 (A.R. 163-65) He indicated he has headaches that are "pounding"  
25 and "throbbing" in nature. The headaches occur almost every day,  
26 and he has headache pain most of the time. He also has constant  
27 pain in both wrists that is aching and burning in nature. Any type  
28 of activity increases his pain, and "nothing" makes the pain

1 better. (A.R. 163) He was taking Neurontin for his headaches and  
2 restless leg symptoms, but it was not working for his headache  
3 pain. He was taking indomethacin (Indocin) for his wrist pain, but  
4 it was not helping and caused him stomach pain. He planned to talk  
5 with his primary care provider about changing his medications.  
6 (A.R. 164)

7 Adams stated the amount of time he can be up and active before  
8 needing to rest "depends on [his] pain level" and the activity.  
9 (*Id.*) He is unable to finish tasks that require use of his hands,  
10 and is unable to do much of anything during a headache. He used to  
11 enjoy riding his bike "all over," but can no longer do this  
12 activity. (*Id.*) He takes occasional walks and can walk "a ways"  
13 before resting if his head is "not pounding." (A.R. 165) He is  
14 able to groom himself, and cleans his apartment without assistance,  
15 but his wife helps him do the laundry once a week. He occasionally  
16 goes out to visit friends, but someone else drives him. His wife  
17 cooks for him, or he eats prepared or canned foods. (*Id.*)

18 Adams also completed an Alcohol and Drug Use Questionnaire,  
19 also on April 17, 2008. He stated he had been sober for "one year  
20 + 28 days." (A.R. 160) Before getting clean and sober, he used to  
21 use methamphetamine and marijuana excessively. (*Id.*) He stated  
22 when he was using, he did not "eat right or clean up." (A.R. 161)

### 23 24 **C. Third-Party Evidence**

#### 25 **1. Stephanie Adams**

##### 26 **a. Written testimony**

27 On April 17, 2008, Adams's wife Stephanie completed an Alcohol  
28 and Drug Use Questionnaire regarding Adams. (A.R. 166-67) She

1 stated Adams had been a long-time user of methamphetamine and  
2 marijuana in the past, but he had been clean and sober for one  
3 year. She indicated when Adams was using drugs, he would not eat,  
4 and he lost a great deal of weight. He also would not care for  
5 himself and his personal hygiene. (*Id.*)

6 Also on April 17, 2008, Stephanie completed a Third-Party  
7 Function Report regarding her husband. (A.R. 152-59) She  
8 described Adams's daily activities as making coffee, smoking  
9 cigarettes, showering three times a week, shaving when going  
10 somewhere important, helping her shop for groceries, helping her  
11 keep house as allowed by his wrist pain and headaches, watching  
12 television, and complaining about his pain. (A.R. 152) She  
13 indicated Adams lets their two dogs outside as needed. His pain  
14 sometimes makes it hard for him to sleep. He has no problems with  
15 personal care, and does not require reminders to take his medica-  
16 tions. (A.R. 153-54) Stephanie does most of the cooking, with  
17 Adams occasionally fixing hot dogs, microwave popcorn, or other  
18 food that does not require cooking - "mostly snacking stuff." (A.R.  
19 154) when he is not in too much pain, he may spend "an hour or so"  
20 helping with housework by picking up the living room, vacuuming,  
21 and sweeping. (*Id.*) According to Stephanie, Adams does not drive  
22 because he does not have a license. He helps Stephanie shop for  
23 food and household supplies three to four times a month. He is  
24 "not good at keeping records," and cannot handle a checkbook or  
25 savings account, but he is able to count change and pay bills.  
26 (A.R. 155)

27 Stephanie indicated her husband's primary activity is watching  
28 television. He spends most of his time with his wife and children.

1 He attends church once a week, if his wife accompanies him;  
2 otherwise, he does not go. (A.R. 156) Stephanie stated Adams's  
3 headaches make him irritable and grouchy, and he does not want to  
4 be around people. She stated Adams has severe carpal tunnel pain  
5 that limits his ability to lift, reach, and use his hands. His  
6 headaches are made worse by bending and walking. She stated Adams  
7 has difficulty completing tasks, concentrating, understanding,  
8 following instructions, and remembering things. According to her,  
9 Adams does not read well, and has to have most things read to him.  
10 He sometimes can follow spoken instructions if his headache pain  
11 "is not above a 6 on 1-10 scale." (A.R. 157) She stated Adams  
12 does not handle stress or changes in routine very well. He wears  
13 splints on his wrists, but they do not always help. (A.R. 158)  
14 Stephanie remarked, "There are times when he almost is in tears  
15 [be]cause he hurts so bad and doesn't know what to do to make it  
16 stop. He gets really angry and irritated easily when pain is  
17 really elevated (most of the time)." (A.R. 159)

18 Stephanie helped Adams complete a Function Report that is  
19 consistent with the one she filled out herself. (See A.R. 144-51)

20 Stephanie wrote a letter dated July 26, 2010, in which she  
21 stated the following regarding Adams's functional limitations:

22 I live with my husband every day. He  
23 drops things because sometimes he has no grip  
24 or feeling in his hands and arms. His arms  
25 and hands hurt often so bad that it hurts him  
26 just to scratch my back. His headaches are so  
bad that sometimes he walks around squinting  
or just goes to bed. When they are bad (which  
is often) he won't/can't eat, [and] therefore  
he has lost weight.

27 Then there is his anger issues. Most of  
28 which I think stem from his pain. However, I  
feel he has some mental anger issues as well.

1 He is angry and irritable a lot. Like 3/4ths  
2 of the time. He has trouble concentrating and  
3 remembering things. When [he] doesn't remem-  
4 ber what someone says he thinks he is right  
5 and gets angry. I think the pain is the cause  
6 of the memory problems as it is so severe.

7 (A.R. 273)

8 ***b. Hearing testimony***

9 At the time of the ALJ hearing, Stephanie and her husband had  
10 been married for "about two and a half years." (A.R. 56) They  
11 were married to each other before, between 1986 and sometime in  
12 1991, when they divorced. They rarely had contact between 1991 and  
13 2007, when they got back together. (A.R. 56-57)

14 Stephanie has observed Adams having "a lot of difficulty with  
15 concentration[, . . and] difficulty understanding and compre-  
16 hending things." (A.R. 57) She stated he can read smaller words,  
17 but she has to explain "big" words. (*Id.*) She helped her husband  
18 fill out his Social Security paperwork because he did not under-  
19 stand how to do it. (A.R. 57-58)

20 Stephanie stated Adams sometimes is unable to eat because his  
21 pain is so bad. She stated, "He goes around the house holding his  
22 head with his eyes like halfway closed and moaning around and  
23 sometimes he'll just have to go lay down." (A.R. 58) According to  
24 Stephanie, Adams's "real bad" headaches occur "two to four times a  
25 week," and he is affected by headache pain "at least three-fourths  
26 of the day." (*Id.*) Regarding his wrist/arm problem, Stephanie  
27 often sees Adams drop things like cigarettes, papers, and coffee.  
28 (A.R. 58-59)

Stephanie stated her husband does not get along very well with people. She indicated Adams's "pain makes him very grouchy and irritable," especially with her. (A.R. 59) He loses patience with their grandchildren and does not do much with them because of his pain. (*Id.*) According to Stephanie, Adams's medications only help "a little," and they make him groggy and tired. The medications also dry out Adams's mouth, making his speech difficult to understand. (*Id.*)

According to Stephanie, Adams does not use methamphetamine, and has not since they remarried. She stated one requirement for her to remarry Adams was that he be clean for a year. She stated that at the time of the hearing, Adams had been off methamphetamine for three years. (A.R. 59-60) He does use marijuana "off and on." (A.R. 59)

## **2. Jamie Colton**

Jamie Colton, a friend of Adams's, wrote a letter dated August 2, 2010, stating he has known Adams for about 30 years, and has watched Adams's health deteriorate during that time. According to Colton, Adams has extreme, chronic pain that causes him to have anger flareups. Colton stated Adams's back pain, arm pain, and headaches, prevent Adams from doing much in the way of physical exertion. According to Colton, when Adams has a headache, he is unable to eat due to the pain. Colton offered his opinion that Adams is "disabled and has gotten progressively worse." (A.R. 274) He stated Adams is unable to work due to pain, and he needs financial support. (*Id.*)

1 **D. Vocational Expert's Testimony**

2 The VE agreed that although Adams has some work history, he  
 3 has not earned enough to have any "past relevant work." (A.R. 62)  
 4 The ALJ asked the VE to consider "a person who fits in the younger  
 5 age category, a person with a marginal education and a person with  
 6 some work in his background but nothing rising to the level of past  
 7 relevant work." (A.R. 61-62) The hypothetical individual would  
 8 have "no exertional limitations whatsoever"; "no postural or  
 9 manipulative or environmental limitations either"; "limited to  
 10 unskilled work [involving] routine repetitive tasks with simple  
 11 instructions"; and no performance of tasks requiring frequent  
 12 interaction with members of the general public, but could have  
 13 "occasional brief contact with the general public." (A.R. 63)

14 The VE stated the hypothetical individual would be able to  
 15 perform work existing in significant numbers in the national  
 16 economy. The VE gave three examples: (1) "packager hand,"  
 17 described as "medium work, SVP 2<sup>8</sup>, unskilled"; (2) "sweeper cleaner  
 18 industrial, . . . medium work, SVP 2, unskilled"; and (3) "laborer  
 19 laundry, . . . medium work, SVP 2, unskilled." (*Id.*)

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22 <sup>8</sup>Jobs are classified with an "SVP," indicating the level of  
 23 "specific vocational preparation" required to perform the job,  
 24 according to the *Dictionary of Occupational Titles*. The SVP "is  
 25 defined as the amount of lapsed time required by a typical worker  
 26 to learn the techniques, acquire the information, and develop the  
 27 facility needed for average performance in a specific job-worker  
 28 situation." *Davis v. Astrue*, slip op., 2011 WL 6152870, at \*9 n.7  
 (D. Or. Dec. 7, 2011) (Simon, J.) (citation omitted). "The DOT  
 identifies jobs with an SVP level of 1 or 2 as unskilled, jobs with  
 an SVP of 3 or 4 as semi-skilled, and jobs with an SVP of 5 or  
 higher as skilled." *Whitney v. Astrue*, slip op., 2012 WL 712985, at  
 3 (D. Or Mar. 1, 2012) (Brown, J.) (citing SSR 00-4p).

1 The ALJ asked the VE to consider the same person, but "assume  
2 that he is essentially functionally illiterate, unable to read."  
3 (A.R. 64) Thus, the individual's "instructions for work tasks  
4 would have to be explained to him verbally." (*Id.*) The VE  
5 indicated that adding illiteracy to the individual's limitations  
6 "would have no discernible impact" on the jobs he could perform.  
7 (*Id.*)

8 Returning to the initial hypothetical, but adding some manipu-  
9 lative limitations ("he can frequently handle, finger and feel")  
10 "would rule out the [hand] packager because that requires con-  
11 tinuous reaching, continuous handling and continuous fingering[,] "  
12 but the manipulative limitations "would not rule out the sweeper  
13 cleaner industrial and it would not rule out the laborer laundry."  
14 (*Id.*) If, instead, the individual could only handle, finger, and  
15 feel occasionally, then both of those jobs would be eliminated, as  
16 well. (A.R. 64-65) However, the individual would be able to work  
17 as a security guard, which is a light, semi-skilled job. The VE  
18 explained that the *Dictionary of Occupational Titles* ("DOT")  
19 identifies the job of security guard as having an SVP of 3.  
20 However, the VE stated the DOT was last updated in 1988, and more  
21 recent publications from the Department of Labor and the State of  
22 Oregon Employment Department specify "that the most significant  
23 course of training for such work is 30 days or less which is tanta-  
24 mount to SVP 2, unskilled work." (A.R. 66)

25 The VE further stated a 1993 addendum to the DOT specifies  
26 that a security guard job requires frequent handling, but the VE  
27 disagreed with that. The VE stated, "The basis of my disagreement  
28 is conducting labor market surveys and doing job analyses for this



1 occupation. In some cases for clients who have hand injuries and  
2 hand limitations [sic]. I would characterize, based on that  
3 experience, that the handling would be more in the occasional  
4 range." (A.R. 66-67) The VE could not explain why the 1993 publi-  
5 cation identified the security guard job as requiring frequent  
6 handling. The VE summarized the duties of the job as "[b]asically  
7 patrolling the grounds of a plant or a commercial establishment,  
8 watching and reporting irregularities, observing surroundings,  
9 contacting the police . . . and or the headquarters of the security  
10 firm if something untoward is transpiring. Keeping a very short  
11 log of events that transpired that were unusual." (A.R. 68)

12 The VE stated he has had occasion to focus on the security  
13 guard job in the past, including "for injured workers who had hand  
14 injuries because unlike so many other jobs in the national or  
15 regional economy, this job requires considerably less physical  
16 demands relative to reaching, handling, fingering and feeling than  
17 do most other jobs[,] particularly true at the unskilled level."  
18 (A.R. 68-69) The VE further explained that the DOT "lists maximum  
19 requirements of occupations as generally performed[,] . . . [b]ut  
20 that doesn't necessarily mean that that's the requirement that's  
21 usually performed." (A.R. 69)

22 The VE indicated the individual also could work as a surveil-  
23 lance systems monitor, an unskilled, sedentary job. (A.R. 67)

24 Adams's attorney asked the VE to identify the reasoning, math,  
25 and language requirements for the security guard and surveillance  
26 systems monitor jobs, as specified in the DOT. The VE stated the  
27 security guard job "is a reasoning level of three, math level of  
28 one, and a language level of two"; and the surveillance systems

1 monitor has a reasoning level of three, math level of one, and  
2 language level of three. (A.R. 70) The VE indicated those levels  
3 are consistent with his expectations of those two jobs.

4 The VE stated all of the jobs he had discussed, for all of the  
5 hypothetical individuals, generally require an ordinary work  
6 schedule, where the employee works two hours, has a fifteen-minute  
7 break, works two more hours, has a longer lunch break, works two  
8 hours, has another fifteen-minute break, and then works two more  
9 hours before the end of the day. He stated there might be "some  
10 small deviation that would be allowed but that would need to be  
11 verified." (A.R. 70-71) The VE indicated that, in general, absen-  
12 teeism of more than one day per month, on an ongoing basis, "would  
13 be likely considered excessive." (A.R. 71) He also stated a  
14 supervisor's tolerance for "back talk . . . would be very minimal,"  
15 and "in most competitive employment . . . simply not acceptable  
16 behavior." (A.R. 71-72)

### 17 18 **III. DISABILITY DETERMINATION AND THE BURDEN OF PROOF**

#### 19 **A. Legal Standards**

20 A claimant is disabled if he or she is unable to "engage in  
21 any substantial gainful activity by reason of any medically  
22 determinable physical or mental impairment which . . . has lasted  
23 or can be expected to last for a continuous period of not less than  
24 12 months[.]" 42 U.S.C. § 423(d)(1)(A).

25 "Social Security Regulations set out a five-step sequential  
26 process for determining whether an applicant is disabled within the  
27 meaning of the Social Security Act." *Keyser v. Commissioner*, 648

1 F.3d 721, 724 (9th Cir. 2011) (citing 20 C.F.R. § 404.1520<sup>9</sup>). The  
 2 Keyser court described the five steps in the process as follows:

3 (1) Is the claimant presently working in a  
 4 substantially gainful activity? (2) Is the  
 5 claimant's impairment severe? (3) Does the  
 6 impairment meet or equal one of a list of  
 7 specific impairments described in the regula-  
 8 tions? (4) Is the claimant able to perform  
 any work that he or she has done in the past?  
 and (5) Are there significant numbers of jobs  
 in the national economy that the claimant can  
 perform?

9 Keyser, 648 F.3d at 724-25 (citing *Tackett v. Apfel*, 180 F.3d 1094,  
 10 1098-99 (9th Cir. 1999)); see *Bustamante v. Massanari*, 262 F.3d  
 11 949, 953-54 (9th Cir. 2001) (citing 20 C.F.R. §§ 404.1520 (b)-(f)  
 12 and 416.920 (b)-(f)). The claimant bears the burden of proof for  
 13 the first four steps in the process. If the claimant fails to meet  
 14 the burden at any of those four steps, then the claimant is not  
 15 disabled. *Bustamante*, 262 F.3d at 953-54; see *Bowen v. Yuckert*,  
 16 482 U.S. 137, 140-41, 107 S. Ct. 2287, 2291, 96 L. Ed. 2d 119  
 17 (1987); 20 C.F.R. §§ 404.1520(g) and 416.920(g) (setting forth  
 18 general standards for evaluating disability), 404.1566 and 416.966  
 19 (describing "work which exists in the national economy"), and  
 20 416.960(c) (discussing how a claimant's vocational background  
 21 figures into the disability determination).

22 The Commissioner bears the burden of proof at step five of the  
 23 process, where the Commissioner must show the claimant can perform  
 24 other work that exists in significant numbers in the national  
 25

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26 <sup>9</sup>Although Keyser dealt with an applicant for Disability  
 27 Insurance benefits under Title II of the Social Security Act, the  
 28 identical five-step sequential evaluation process is applied to  
 applications for SSI under Title XVI of the Act. Compare 20 C.F.R.  
 § 404.1520 with 20 C.F.R. § 416.920.

economy, "taking into consideration the claimant's residual functional capacity, age, education, and work experience." *Tackett v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999). If the Commissioner fails meet this burden, then the claimant is disabled, but if the Commissioner proves the claimant is able to perform other work which exists in the national economy, then the claimant is not disabled. *Bustamante*, 262 F.3d at 954 (citing 20 C.F.R. §§ 404.1520(f), 416.920(f); *Tackett*, 180 F.3d at 1098-99).

The ALJ also determines the credibility of the claimant's testimony regarding his or her symptoms:

In deciding whether to admit a claimant's subjective symptom testimony, the ALJ must engage in a two-step analysis. *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). Under the first step prescribed by *Smolen*, . . . the claimant must produce objective medical evidence of underlying "impairment," and must show that the impairment, or a combination of impairments, "could reasonably be expected to produce pain or other symptoms." *Id.* at 1281-82. If this . . . test is satisfied, and if the ALJ's credibility analysis of the claimant's testimony shows no malingering, then the ALJ may reject the claimant's testimony about severity of symptoms [only] with "specific findings stating clear and convincing reasons for doing so." *Id.* at 1284.

*Batson v. Commissioner*, 359 F.3d 1190, 1196 (9th Cir. 2004).

#### **B. The ALJ's Decision**

The ALJ found Adams has not engaged in substantial gainful activity since his application date of March 12, 2008. He found Adams has severe impairments consisting of "cognitive disorder not otherwise specified; dysthymic disorder; and history of polysubstance abuse." (A.R. 22) He concluded that Adams "experiences

1 moderate limitations in concentration, persistence or pace due to  
2 his mental disorders." (*Id.*)

3       The ALJ found none of the physical impairments of which Adams  
4 complains would cause any more than minimal limitations in Adams's  
5 ability to perform basic work activities, and therefore, none of  
6 them is severe. (A.R. 22-23) The ALJ found the record evidence  
7 contains "no objective medical evidence of any acute findings or  
8 significant functional limitations relating to these conditions."  
9 (A.R. 22) Regarding Adams's carpal tunnel syndrome, the ALJ noted  
10 his peripheral nerve conduction studies were normal, and soon after  
11 that testing, Adams indicated he no longer needed the wrist braces.  
12 The ALJ further noted the disability investigator had observed that  
13 Adams "handled objects with ease and had no trouble grasping,  
14 shuffling or manipulating." (A.R. 22-23) The ALJ further noted  
15 Adams's head CT scan was normal; he "had full range of motion in  
16 his back, full 5/5 motor strength and normal sensory testing, gait  
17 and deep tendon reflexes"; and in June 2009, Adams reported doing  
18 well, with less intense headaches, and periods when he was almost  
19 free of pain without medications. (A.R. 23)

20       Regarding Adams's restless leg syndrome, the ALJ noted Adams  
21 had only been treated by nurse practitioners, who "are not  
22 acceptable medical sources" under the regulations. However, even  
23 if they were acceptable medical sources, the ALJ noted "their  
24 findings [were] based primarily on [Adams's] subjective complaints  
25 and [were] not substantiated by sufficient objective medical  
26 evidence." (*Id.*) The ALJ therefore found Adams's restless leg  
27 syndrome was "not medically determinable." (*Id.*)

1       The ALJ gave "no weight" to NP Bischoff's undated opinion  
2 letter, finding the opinion "is not supported by any appropriate  
3 medical findings and appears to be based largely on [Adams's]  
4 subjective reports/allegations." (A.R. 24) The ALJ further found  
5 NP Bischoff's opinion to be inconsistent with notes from Adams's  
6 physical examinations, and "entirely inconsistent with the opinions  
7 of state agency medical consultants, Drs. Jensen and Alley, who  
8 concluded that [Adams's] physical impairments are not severe and do  
9 not result in any functional limitations." (*Id.*) The ALJ gave  
10 "significant weight" to the opinions of Drs. Jensen and Alley, both  
11 of whom cited findings in the medical evidence indicating Adams's  
12 physical conditions are not disabling. (A.R. 23)

13       The ALJ noted there is no record evidence regarding Adams's  
14 allegedly "'terminal' medical condition from exposure to a toxic  
15 paint chemical while at a job in 2000," and the ALJ therefore found  
16 "this alleged condition is not medically determinable." (A.R. 24)

17       The ALJ found Adams's impairments, singly or in combination,  
18 do not meet or medically equal the criteria of any listed  
19 impairment in the regulations, including Listings 12.02 (Organic  
20 Mental Disorders); 12.04 (Affective Disorders); 12.05C (Mental  
21 Retardation, specifically with "[a] valid verbal, performance, or  
22 full scale IQ of 60 through 70 and a physical or other mental  
23 impairment imposing an additional and significant work-related  
24 limitation of function"; see A.R. 351); and 12.09 (Substance Addic-  
25 tion Disorders). (A.R. 24) He found Adams has mild restriction in  
26 his activities of daily living; no difficulties in social func-  
27 tioning; moderate difficulties with regard to concentration,

28

1 persistence, or pace; and no extended episodes of decompensation.  
2 (A.R. 24-25)

3 The ALJ discussed listing 12.05C further, because at the close  
4 of the hearing, Adams's attorney specifically asked the ALJ "to  
5 give consideration to listing 12.05(C)." (A.R. 72) Adams's  
6 attorney stated, "If one couples the IQ scores that the  
7 psychologist, Doctor Dietland [sic], considered to be the result of  
8 good effort, with any of these other significant vocational  
9 impairments, there could be a listing here." (*Id.*) The ALJ found  
10 "no evidence of onset before [Adams] turned age 22, as required by  
11 the listing." (A.R. 25) Further, although the ALJ noted  
12 Dr. Dietlein's finding that Adams has "significant cognitive limi-  
13 tations," the ALJ further noted the doctor "did not diagnose  
14 [Adams] as being mentally retarded." (*Id.*) The ALJ also noted  
15 that the investigator's report indicated Adams "presented as func-  
16 tional," and appeared "perhaps uneducated but not retarded or  
17 lacking in cognitive functioning." (*Id.*) The ALJ further found,  
18 "Moreover, the record indicates that [Adams] used drugs heavily  
19 from age 15 until 2007, which I find has likely contributed to his  
20 cognitive limitations." (*Id.*; exhibit citation omitted).

21 The ALJ found Adams has "the residual functional capacity to  
22 perform a full range of work at all exertional levels but with the  
23 following nonexertional limitations: [he] is able to perform  
24 unskilled work (routine, repetitive tasks with simple instructions)  
25 with occasional, brief contact with the general public; and [he]  
26 should be given verbal instructions for work tasks." (A.R. 26)  
27 The ALJ found Adams's allegations "regarding his alleged  
28 impairments and limited activities are not fully credible." (A.R.

1 27) The ALJ relied heavily on the investigator's report, noting  
2 Adams told the investigator "he had applied for several jobs, which  
3 is not consistent with being disabled from working or being only  
4 able to do minimal activities of daily living, as he alleged."  
5 (*Id.*) He noted the investigator indicated Adams demonstrated the  
6 ability to read through his list of prior employers, exhibited good  
7 long-term and short-term memory, tracked the conversation without  
8 difficulty, demonstrated good vocabulary, and "was sober, alert,  
9 talkative, personable and socially appropriate." (*Id.*) The ALJ  
10 noted Adams's presentation to the investigator differed signifi-  
11 cantly from his presentation to Dr. Dietlein. Together with the  
12 other record evidence, and the state agency psychologists'  
13 opinions, the ALJ found Adams's allegations regarding his limited  
14 functional abilities were not credible. He indicated Adams's  
15 "exaggerations and/or inconsistencies regarding his limitations  
16 call into question [Adams's] credibility and indicate that his  
17 allegations of disability are suspect. In addition, [his] allega-  
18 tions that he has a 'terminal' medical condition due to paint  
19 exposure are undocumented and unconvincing." (*Id.*)

20 With regard to Adams's mental functional abilities, in par-  
21 ticular, the ALJ noted Adams has had very little treatment other  
22 than taking an anti-depressant prescribed by his primary care  
23 physician or a nurse practitioner. Adams has not been in any type  
24 of regular counseling or psychotherapy, and psychological testing  
25 indicates he can perform unskilled work and engage in social  
26 interactions successfully. The ALJ gave "significant weight" to  
27 Dr. Dietlein's opinion, which was based on Adams's "overall  
28 performance on intelligence testing[.]" (A.R. 28) The ALJ noted



1 Dr. Dietlein had found Adams's IQ to be low, and indicated Adams  
2 would have problems sustaining concentration and attention, but the  
3 doctor further found Adams's "memory is largely intact, and . . .  
4 he exhibited the ability to persist in 'what was asked of him,' as  
5 well as 'engage in social interactions successfully.'" (*Id.*; cita-  
6 tion omitted) The ALJ found Dr. Dietlein's assessment supportive  
7 of the ALJ's conclusion that Adams "is capable of performing  
8 unskilled work involving routine, repetitive tasks with simple,  
9 verbal instructions and occasional, brief interaction with the  
10 general public." (A.R. 28-29) The ALJ also gave significant  
11 weight to the opinions of Drs. Anderson and Kennemer, both of whom  
12 opined Adams would be able to understand, remember, and carry out  
13 simple, routine tasks, and have occasional contact with the general  
14 public. (A.R. 29)

15 The ALJ found Stephanie Adams's testimony mirrored Adams's  
16 allegations regarding his limitations, and therefore, her state-  
17 ments were not entirely credible for the same reasons Adams's  
18 allegations were not fully credible. (*Id.*)

19 The ALJ relied on the VE's testimony in finding Adams is  
20 capable of performing jobs that exist in significant numbers in the  
21 national economy. The ALJ cited four jobs discussed by the VE as  
22 jobs Adams could perform; i.e., packager, hand; sweeper, cleaner;  
23 laborer, laundry; and guard, security. The ALJ found the VE had  
24 provided a reasonable explanation for the discrepancy between the  
25 VE's opinion of the skill rating for the security guard position  
26 (SVP 2), and the skill level listed in the *DOT* (SVP 3). (A.R. 30-  
27 31) Because the ALJ found Adams is able to work, he concluded  
28 Adams had not been under a disability at any time from the date of

his application (March 12, 2008), through the date of the ALJ's decision (September 3, 2010). (A.R. 31)

#### IV. STANDARD OF REVIEW

The court may set aside a denial of benefits only if the Commissioner's findings are "'not supported by substantial evidence or [are] based on legal error.'" *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009) (quoting *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)); accord *Black V. Comm'r of Soc. Sec. Admin.*, slip op., 2011 WL 1930418, at \*1 (9th Cir. May 20, 2011). Substantial evidence is "'more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)).

The court "cannot affirm the Commissioner's decision 'simply by isolating a specific quantum of supporting evidence.'" *Holohan v. Massanari*, 246 F.3d 1195, 1201 (9th Cir. 2001) (quoting *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1998)). Instead, the court must consider the entire record, weighing both the evidence that supports the Commissioner's conclusions, and the evidence that detracts from those conclusions. *Id.* However, if the evidence as a whole can support more than one rational interpretation, the ALJ's decision must be upheld; the court may not substitute its judgment for the ALJ's. *Bray*, 554 F.3d at 1222 (citing *Massachi v. Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007)).

/ / /

/ / /

1 **V. DISCUSSION**

2 Adams argues the ALJ erred in failing to find him disabled,  
3 listing numerous ways in which he claims the ALJ erred. Dkt. #19,  
4 p. 5.<sup>10</sup> Only two of the issues Adams raises are discussed here, the  
5 first for purposes of procedural clarity, and the second because it  
6 is dispositive of the case.

7  
8 **A. Adjudication of Prior Application**

9 Adams argues the ALJ erred in failing to adjudicate his prior  
10 application, "first denied November 20, 2007." Dkt. #19, p. 17;  
11 see A.R. 125 (showing initial denial on 11/20/2007). Adams asserts  
12 that a prior determination may be reopened for any reason within  
13 twelve months of the initial notice of denial. *Id.* (citing 20  
14 C.F.R. § 416.1488(a)). He argues that because his denial was less  
15 than twelve months prior to the March 12, 2008, filing date of his  
16 current application, and because the ALJ acknowledged Adams's  
17 request to reopen the prior decision, the ALJ erred in failing to  
18 adjudicate Adams's prior application. *Id.*

19 The parties agree that, in general, the Commissioner's refusal  
20 to reopen a prior decision is not subject to judicial review. *Id.*;  
21 Dkt. #21, p. 18; see *Klemm v. Astrue*, 543 F.3d 1139, 1144 (9th Cir.  
22 2008) ("Because a denial of a motion to reopen is a discretionary  
23 decision, it is not final and, thus, is not generally reviewable by  
24 a district court.") (citations omitted); 42 U.S.C. § 405(g)

25  
26 <sup>10</sup>Page citations to the parties' briefs refer to the pagination  
27 applied by the court's electronic filing system, rather than to the  
28 page numbers entered by the parties on their briefs. See, e.g.,  
Dkt. #19, where the plaintiffs' brief shows "Page 1," but the ECF  
system shows "Page 5 of 36."

(district courts have jurisdiction to review only "final decisions" of the Commissioner); see also *Anderson v. Astrue*, 2010 WL 4365767, at \*\*2-3 (D. Or. Aug. 19, 2010) (Clarke, MJ) (discussing the four-step administrative process an applicant must complete in order to receive a final, reviewable decision). The parties also agree that an exception to this general rule exists "where the Commissioner considers 'on the merits' the issue of the claimant's disability during the already-adjudicated period." *Lester v. Chater*, 81 F.3d 821, 827 n.3 (9th Cir. 1995) (citation omitted); see Dkt. #19, p. 17; Dkt. #21, pp. 18-19. "Where such a *de facto* reopening occurs, the Commissioner's decision as to the prior period is subject to judicial review." *Lester, supra*.

The ALJ stated, at the beginning of the hearing, "And I note that you have in writing requested that a previous application be re-opened so I will include that in my decision making process." (A.R. 41) Adams argues, "Here there was no refusal to reopen, but rather a failure to finish the promise. The ALJ's promise is a reopening, and the prior application requires due process consideration." Dkt. #19, p. 17. The Commissioner argues the ALJ's statement "only indicated that the ALJ would consider the reopening request." Dkt. #21, p. 19.

It was not clear from the ALJ's statement whether he meant to convey that he would consider the request to reopen, or the prior application itself. However, it is apparent from the ALJ's decision that he intended the former, and although he did not expressly so state, the ALJ denied Adams's request to review the prior denial. This is clear from the time period encompassed by the ALJ's ruling. Rather than ruling on whether Adams was disabled

1 from his alleged disability onset date of March 31, 2007, which  
 2 would have included the already-adjudicated period, the ALJ limited  
 3 his ruling to the period from the date of Adams's current applica-  
 4 tion, March 12, 2008. (See A.R. 20-31) Thus, the ALJ did not  
 5 "consider[] 'on the merits' the issue of the claimant's disability  
 6 during the already-adjudicated period." *Lester*, 81 F.3d at 827  
 7 n.3. The denial of Adams's request to reopen the prior decision is  
 8 not subject to judicial review. See *Klemm, supra*.

#### 9 10 **B. Listing 12.05C**

11 Adams argues the ALJ erred in failing to find him disabled  
 12 under listing 12.05C. Dkt. #19, pp. 22. The Commissioner argues  
 13 the ALJ did not err "because the record does not show the onset of  
 14 cognitive disorder before the age of 22." Dkt. #21, p. 4; see *id.*,  
 15 pp. 4-8.

16 For Adams to show he is disabled under listing 12.05C, he must  
 17 show that his impairment meets all of the following criteria:

18 12.05 Mental retardation: Mental retardation  
 19 refers to significantly subaverage general  
 20 intellectual functioning with deficits in  
 21 adaptive functioning initially manifested  
 during the developmental period; i.e., the  
 evidence demonstrates or supports onset of the  
 impairment before age 22.

22 The required level of severity for this  
 23 disorder is met when the requirements in A, B,  
 C, or D are satisfied.

24 \* \* \*

25 C. A valid verbal, performance, or full scale  
 26 IQ of 60 through 70 and a physical or other  
 27 mental impairment imposing an additional and  
 significant work-related limitation of func-  
 tion[.]

28 20 C.F.R. pt. 404, subpt. P, app. 1, § 12.05C ("listing 12.05C").

1 The ALJ gave four reasons for his finding that Adams's  
2 impairment does not meet listing 12.05C:

3 [E]ven though I do not find that [Adams's]  
4 impairments include mental retardation, I have  
5 considered whether [his] cognitive impairment  
6 meets medical listing 12.05C for mental retar-  
7 dation. Although [Adams's] representative  
8 asserted that [Adams] meets listing 12.05C  
9 based on his IQ score, I find that [Adams's]  
10 cognitive disorder does not meet 12.05C  
11 because [1] there is no evidence of onset  
12 before he turned age 22, as required by the  
13 listing. [2] Dr. Dietlein's report indicates  
14 that [Adams] does have significant cognitive  
15 limitations; however, Dr. Dietlein did not  
16 diagnose [Adams] as being mentally retarded.  
17 [3] In addition, the [investigative] report  
18 indicates that [Adams's] level of cognitive  
19 functioning is much higher than exhibited with  
20 Dr. Dietlein ("cognitively speaking [Adams]  
21 presented as functional;" "he gave the impres-  
22 sion of someone [who] was perhaps uneducated  
23 but not retarded or lacking in cognitive func-  
24 tioning"). [4] Moreover, the record indicates  
25 that [Adams] used drugs heavily from age 15  
26 until 2007, which I find has likely con-  
27 tributed to his cognitive limitations.

28 (A.R. 25; citations to exhibits omitted)

Regarding the ALJ's first two reasons - that the record lacks  
evidence showing Adams's impairment began before age 22, and  
Dr. Dietlein did not diagnose Adam as being mentally retarded -  
Adams argues the ALJ failed to consider "the Oregon Youth Authority  
records documenting Adams'[s] academic and behavioral challenges  
before age 22." Dkt. #19, p. 19. Adams argues the ALJ's failure  
to address this evidence was an error of law. *Id.* n.3. In  
addition, Adams argues no formal diagnosis of mental retardation is  
required to meet the regulatory requirements. *Id.*, p. 18.

Adams relies, in particular, on *Brooks v. Astrue*, 2012 WL  
4739533 (D. Or. Oct. 3, 2012) (Simon, J.). In that case, the  
claimant Brooks argued the ALJ erred in finding he did not meet

1 listing 12.05C. Brooks offered evidence of two IQ tests,  
2 administered when he was 47 and 50 years of age. The earlier test  
3 results indicated Brooks had a Verbal IQ of 61, a performance IQ of  
4 60, and a full-scale IQ of 58. The later test results indicated  
5 Brooks had a Verbal IQ of 67, a performance IQ of 72, and a full-  
6 scale IQ of 66. A medical expert at the ALJ hearing testified the  
7 results of both IQ tests were valid. Brooks also offered his high  
8 school transcript, showing that he failed most of his classes. The  
9 ALJ found the IQ tests did not establish that Brooks had a  
10 cognitive impairment prior to age 22. "Further, the ALJ rejected  
11 using Mr. Brooks'[s] transcript as substitute evidence because the  
12 'records did not include standardized test results or explain the  
13 basis for the low grades.'" *Brooks*, 2012 WL 4739533, at \*4.

14 Judge Simon held the plain language of the regulations demon-  
15 strates that a claimant "may meet the listing without a formal  
16 diagnosis of mental retardation." *Id.*, at \*5 (citing 20 C.F.R. pt.  
17 404, subpt. P, app. 1, § 1200, which provides "the claimant must  
18 only 'satisfy[] the diagnostic description in the introductory  
19 paragraph' in addition to the C criteria."). Judge Simon noted  
20 that although the Ninth Circuit has yet to address the issue,  
21 "other circuits and district courts within the Ninth Circuit have  
22 presumed that a valid adult IQ score is evidence that the impair-  
23 ment existed during the claimant's developmental period."  
24 *Id.* (citing cases from the 4th and 11th Circuits, and the Eastern  
25 District of California). Judge Simon joined Judges Hernandez and  
26 Marsh from this court in holding "a valid adult IQ score can be  
27 reflective of an impairment that manifested during the claimant's  
28 developmental period." *Id.*, at \*6 (citations omitted). Judge

1 Simon further noted "the language of the Listing supports the use  
2 of circumstantial evidence, acquired after the end of a claimant's  
3 developmental period, to satisfy the diagnostic requirements of the  
4 listing." *Id.* (citing 20 C.F.R. pt. 404, subpt. P, app. 1 § 12.05:  
5 "[T]he evidence demonstrates *or supports* onset of the impairment  
6 before age 22.'" Emphasis added.).

7 The IQ test administered to Adams by Dr. Dietlein yielded a  
8 Verbal IQ of 64, Performance IQ of 69, and Full Scale IQ of 63.  
9 Dr. Dietlein made no finding concerning the validity of the scores,  
10 but noted Adams "appeared to put a good effort forth[.]" (A.R.  
11 310) The Commissioner indicates Dr. Dietlein "did not diagnose  
12 mental retardation, nor was he able to determine whether [Adams]  
13 had a learning disorder, deficits in adaptive functioning, or  
14 subaverage intellectual functioning as a child." Dkt. #21, p. 6  
15 (citing A.R. 312). The doctor did state, however, based on his  
16 findings, "it is plausible that Mr. Adams may have had ADHD as a  
17 child with tandem learning disabilities. His cognitive limitations  
18 in tandem with his reported chemical exposure may have compromised  
19 what may have been previous poor cognitive functioning." (A.R.  
20 312)

21 The records provided by the Oregon Youth Authority's MacLaren  
22 School for Boys, and Marion County Family Court Service records,  
23 provide evidence that Adams did, indeed, have "previous poor  
24 cognitive functioning." The records date from April 24, 1979, to  
25 May 13, 1983, the period when Adams was 13 to 17 years of age, and  
26 reflect the following facts. In April 1979, Adams was in the sixth  
27 grade, and was making mostly Cs and Ds. (A.R. 211) Adams had very  
28 poor attendance, did not complete his homework assignments, had



1 poor communication skills, and exhibited behavior problems.  
2 According to Adams's mother, his attitude, motivation, and behavior  
3 had deteriorated following the death of his father. (A.R. 211-15)  
4 The school wanted to test Adams to see if he should be put into a  
5 special education program, but Adams did not want to participate in  
6 the testing, and his mother "[b]owed to her son's wishes." (A.R.  
7 216; see A.R. 213-14) In October 1980, a counselor opined that  
8 Adams likely would "not do much beyond getting a GED and being  
9 involved in some type of job." (A.R. 217)

10 On October 3, 1980, when Adams was in seventh grade at "Court  
11 School," to which he had been ordered as a result of a juvenile  
12 conviction, his teacher estimated that Adams's "basic skill level  
13 [was] at about the 3rd grade [level]." (A.R. 225) Notes indicate  
14 Adams had "just learned the months of the year and their order," as  
15 well as "the days of the week and how to spell them," in late  
16 September 1980. (A.R. 226) He was "working on addition in math."  
17 (*Id.*) He was required to keep a journal, and his journal entries  
18 were printed, not written in cursive. Adams wrote, "I Like school  
19 it is Fun. I Like to talk. I Like to go home. I See a dog."  
20 (*Id.*) Adams told his teacher that he had never been in special  
21 education classes. The teacher observed, "I can understand . . .  
22 why he'd skip school if he wasn't in special classes - especially  
23 because he seems very embarrassed by his low skills. He doesn't  
24 ask for help and keeps a low profile. [Adams] reads orally pretty  
25 smoothly but is lacking in comprehension skills." (*Id.*)

26 In November 1980, Adams was noted to be "doing very well" at  
27 the Court School, as far as his attendance and behavior. The  
28 school wanted to test Adams "because his developmental level

1 seem[ed] to be below what it should be." However, the counselor  
2 had been unable to contact Adams's mother regarding the proposed  
3 testing, despite repeated attempts to do so. (A.R. 220; see A.R.  
4 218-20)

5 In the next progress note, dated December 3, 1980, Adams's  
6 teacher indicated Adams's "skills academically have not increased  
7 much in 90 days. . . . He completes assignments with difficulty,  
8 and is functioning at about a 3rd grade level." (A.R. 227) The  
9 next month, his teacher noted Adams "completes assignments with  
10 difficulty at about a 3rd grade level (working at a 4th grade  
11 level, with one-on-one instruction)." (A.R. 228) Adams had prob-  
12 lems with skipping school, and sleeping during class, and he  
13 generally kept to himself. His teacher and counselor indicated  
14 Adams had problems with inadequate supervision at home. (A.R. 226-  
15 31)

16 When Adams entered the MacLaren School, in April 1981, the  
17 intake counselor recommended Adams "be involved in a remedial  
18 school program." (A.R. 234-35) As of June 9, 1981, his grades  
19 were as follows: Driver's Education - C; Math Lab - D; Language Lab  
20 - B; Physical Education - B; Social Studies - C; Shop - C. His  
21 performance in the math lab was noted to be "poor," on average.  
22 (A.R. 237) One month later, his Social Studies grade had dropped  
23 to a D. He was noted to be wasting time, failing to complete  
24 assignments, and having attitude and cooperation problems in Math  
25 Lab and Social Studies. In Language Lab, he was "doing fine," and  
26 "progressing." (A.R. 238) By August 20, 1981, Adams was making an  
27 F in Math Lab, not keeping up with his written work, violating the  
28 rules of his residential cottage, exhibiting lack of motivation,

1 and not participating in group activities. (A.R. 239) By  
2 October 6, 1981, notes indicate Adams seemed to be "making [a]  
3 downhill slide," and seemed to have "quit trying." (A.R. 241) He  
4 still was failing to complete his written assignments. (*Id.*) A  
5 case review dated November 3, 1981, indicates Adams had "continued  
6 to go downhill." (A.R. 243) He had been caught smoking marijuana,  
7 resulting in a reduction in privileges. His behavior was "poor to  
8 acceptable." (*Id.*) His current grades were Shop - C+; Physical  
9 Education - C; Language Lab - B; Reading Lab - C; Social Studies -  
10 C; and Math Lab - "R."<sup>11</sup> (*Id.*) In December 1981, Adams's attitude  
11 and behavior had improved somewhat, but his performance in school  
12 remained poor. (A.R. 244)

13 A progress report and case review dated February 10, 1982,  
14 indicated Adams continued to have difficulties with his motivation  
15 and attitude, disregard for cottage rules, and certain negative  
16 behaviors. His current grades were Art - C-; Shop - C+; Physical  
17 Education - "Passing"; Math - C-; Math Lab - "R-"; Reading Lab - B;  
18 and Language Lab - C+. "Comments from his teachers were that his  
19 performance and behavior were average and above, with the exception  
20 of Math. Lab, where his performance was poor." (A.R. 247) Adams  
21 was "paroled to his mother and stepfather on 2-12-82," at age 16.  
22 (A.R. 248) He enrolled in high school, but almost immediately  
23 began skipping school, and using drugs. (A.R. 248-49) He was  
24 returned to MacLaren School due to parole violations, and had  
25 ongoing problems with absconding and behavior. (See A.R. 252-61)  
26 A case review dated January 11, 1983, indicates Adams's grades

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27  
28 <sup>11</sup>The records do not indicate the meaning of an "R" grade.

1 were: Art - C; Shop - C; Physical Education - B; Math Lab - "R  
2 (C-)", Language Lab - B; Reading Lab - B; and Basic Reading - D.  
3 (A.R. 262)

4 The Commissioner argues "this evidence was not probative or  
5 significant," and "provide[d] little insight into deficits in  
6 [Adams's] adaptive functioning or significantly subaverage intel-  
7 lectual functioning." Dkt. #21, pp. 7, 8. The Commissioner claims  
8 these records show that most of Adams's problems "stem[med] from an  
9 unstable home life . . . manifest[ing] in criminal behavior and  
10 poor school attendance," rather than subaverage intelligence. *Id.*,  
11 p. 7. The court disagrees that this evidence lacks significance.  
12 The records show, for example, that Adams only learned the months  
13 of the year and their correct order, and the days of the week and  
14 their spellings, at age 14. At age 15, testing indicated he was  
15 functioning at level 4.3 in Reading; 2.4 in Math; 3.4 in Language;  
16 and 5.7 in Spelling. (A.R. 252) The evidence indicates these  
17 cognitive deficits were evident well before Adams reportedly began  
18 abusing drugs (the ALJ's fourth reason for failing to find Adams  
19 met listing 12.05C), and provide substantial circumstantial evi-  
20 dence that "supports onset of the impairment before age 22," as  
21 required by the regulations.

22 Considering these records from Adams's adolescence, his  
23 extremely low IQ scores as determined by Dr. Dietlein's testing,  
24 and Dr. Dietlein's observations of Adams and opinions regarding  
25 Adams's impaired cognitive functioning, the court is convinced that  
26 Adams's cognitive impairment manifested during his developmental  
27 period. The court finds it was error for the ALJ to ignore the  
28 school and court records. See 20 C.F.R. pt. 404, subpt. P, app. 1

1 § 1200(D) ("In addition [to medical evidence], we will consider  
2 information you provide from other sources when we determine how  
3 the established impairment(s) affect your ability to function. We  
4 will consider all relevant evidence in your case record.").

5 As a third reason for finding Adams's impairment did not meet  
6 listing 12.05C, the ALJ cited the investigative report, which the  
7 ALJ found indicated Adams's "level of cognitive functioning is much  
8 higher than exhibited with Dr. Dietlein." (A.R. 25) The investi-  
9 gator's observations were largely consistent with Dr. Dietlein's  
10 regarding Adams's ability to carry on a conversation, and engage in  
11 successful social interactions. However, the investigator's obser-  
12 vations did nothing to discount Dr. Dietlein's objective testing.  
13 Dr. Dietlein noted the test results indicated Adams has "signi-  
14 ficant problems" with his "ability to attend to verbally presented  
15 information, to process information in memory and then to formulate  
16 a response"; "significant problems performing basic mental arith-  
17 metic"; and an "inadequate" ability to think abstractly. (A.R.  
18 311) These observations are consistent with notations appearing  
19 throughout Adams's school records.

20 This is not a case where, for example, a claimant asserts he  
21 is unable to walk, but an investigator observes him walking, or a  
22 claimant testifies he cannot lift over 10 pounds, but an investi-  
23 gator observes him carrying a toddler. There is no indication that  
24 the disability investigator in this case had any particular  
25 training or experience in recognizing or diagnosing mental dis-  
26 orders or cognitive deficits. His observations are insufficient to  
27 undermine the results of the objective IQ testing, and the opinions  
28 of a trained psychologist, particularly where the test results

1 appear to be consistent with the other evidence of record. Dr.  
2 Dietlein is an "acceptable medical source" under the regulations,  
3 and his opinion is entitled to "more weight than the brief  
4 observations documented by the non-treating, non-examining, non-  
5 medical disability investigator[]." *Lubin v. Comm'r*, 507 Fed.  
6 Appx. 709, 711 (9th Cir. 2013) (citing 20 C.F.R. §§ 404.1527 and  
7 416.927, which provide that "the opinion of an acceptable medical  
8 source is given more weight than that of non-medical sources, as  
9 defined in 20 C.F.R. 404.1513(d), 416.913(d)").

10 The court finds Adams has met the introductory requirement to  
11 show his impairment began before age 22, and the first requirement  
12 of listing 12.05C, requiring an IQ of 60 through 70. However, that  
13 does not end the inquiry. To satisfy the requirements of listing  
14 12.05C, Adams also must show that he has "a physical or other  
15 mental impairment imposing an additional and significant work-  
16 related limitation of function." Listing 12.05C. "This require-  
17 ment is satisfied when an additional impairment's 'effect on a  
18 claimant's ability to perform basic work activities is more than  
19 slight or minimal.'" *Brooks*, 2012 WL 4739533, at \*8 (quoting  
20 *Fanning v. Bowen*, 827 F.2d 631, 633 (9th Cir. 1987) (citations  
21 omitted)). In other words, if the ALJ finds a claimant "has  
22 another severe impairment at step two, then the requirement is  
23 satisfied." *Id.* (citing cases so holding).

24 Here, the ALJ found "another severe impairment at step two."  
25 *Id.* He found Adams has severe impairments including "cognitive  
26 disorder not otherwise specified; dysthymic disorder; and history  
27 of polysubstance abuse." (A.R. 22) The ALJ further found "[t]he  
28 medical evidence indicates [Adams] has limitations in his capacity

1 to perform basic work activities due to" these impairments; speci-  
2 fically, "moderate limitations in concentration, persistence or  
3 pace." (*Id.*) As a result, Adams's mental impairment also meets  
4 the requirement that he have an "other mental impairment imposing  
5 an additional and significant work-related imitation of function."  
6 Listing 12.05C.

7 Substantial evidence in the record indicates Adams's mental  
8 impairment meets all of the criteria of Listing 12.05C. The record  
9 lacks substantial evidence to support the ALJ's contrary conclu-  
10 sion. Adams, therefore, should have been found disabled at step  
11 three of the sequential evaluation process. See 20 C.F.R.  
12 § 416.920(d) (claimant whose impairments meet or equal a listed  
13 impairment will be found "disabled without considering [the  
14 claimant's] age, education, and work experience"); *Sullivan v.*  
15 *Zebley*, 493 U.S. 521, 532-33, 110 S. Ct. 885, 892, 107 L. Ed. 2d  
16 967 (1990) ("[T]he listings were designed to operate as a presump-  
17 tion of disability that makes further inquiry unnecessary. That  
18 is, if an adult is not actually working and his impairment matches  
19 or is equivalent to a listed impairment, he is presumed unable to  
20 work and is awarded benefits without a determination whether he  
21 actually can perform his own prior work or other work."); *Tackett*,  
22 180 F.3d at 1098 (if claimant's impairment meets or equals a listed  
23 impairment, then "the claimant is 'disabled' and therefore entitled  
24 to . . . benefits").

## 25 26 VI. CONCLUSION

27 The court has the power to enter a judgment affirming, modi-  
28 fying, or reversing the Commissioner's decision, with or without

1 remand for further proceedings. 42 U.S.C. § 405(g). The court has  
2 "discretion to remand a case either for additional evidence and  
3 findings or to award benefits." *Smolen*, 80 F.3d at 1292 (citation  
4 omitted). If the record has been fully developed and further  
5 administrative proceedings would not serve any useful purpose, then  
6 the court may direct an immediate award of benefits. *Id.*

7 Here, no further proceedings are necessary. The record  
8 contains substantial evidence that Adams's mental impairment meets  
9 the requirements of listing 12.05C, and he therefore is disabled.  
10 Accordingly, the undersigned recommends the Commissioner's decision  
11 be **reversed**, and this case be remanded for payment of benefits.

#### 12 13 **VII. SCHEDULING ORDER**

14 These Findings and Recommendations will be referred to a  
15 district judge. Objections, if any, are due by **September 6, 2013**.  
16 If no objections are filed, then the Findings and Recommendations  
17 will go under advisement on that date. If objections are filed,  
18 then any response is due by **September 23, 2013**. By the earlier of  
19 the response due date or the date a response is filed, the Findings  
20 and Recommendations will go under advisement.

21 IT IS SO ORDERED.

22 Dated this 19th day of August, 2013.

23  
24 /s/ Dennis J. Hubel

25 \_\_\_\_\_  
26 Dennis James Hubel  
27 Unites States Magistrate Judge  
28